No. 02-479

Supreme Court, U.S.
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In The
Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF MINNESOTA, CONNECTICUT, ILLINOIS, KENTUCKY, MASSACHUSETTS, MISSOURI, NEW MEXICO, VERMONT, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of eleven (11) states: Minnesota, Connecticut, Illinois, Kentucky, Massachusetts, Missouri, New Mexico, Vermont, Washington, West Virginia, and Wisconsin. The *amici curiae* States strongly support affirmance of the Ninth Circuit Court of Appeals' decision in this case and the resulting use of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12165, by their citizens without limitation. Although the States more typically advocate the application of Eleventh Amendment immunity, this case is different. Because of the vital public policy underlying the landmark ADA legislation, and in particular Title II, and because of the central role of the States in providing the public services, programs and activities subject to Title II, the *amici curiae* States, consistent with the obligation of their respective attorneys general to protect the public interest, file this *amici curiae* brief.

Where, as here, a legislative enactment constitutes a valid exercise of Congress's Section 5 power under the Fourteenth Amendment, the States have a compelling interest in the full implementation of the law. The States should support every effort to eradicate the effects of the documented long-term, pervasive and invidious discrimination against people with disabilities in the provision of public services. Citizens should not be dependent upon a waiver of immunity from the state to pursue the important rights protected by Title II. Rather, Title II's equal protection and due process-based purposes, and the *amici curiae* States' desire to eliminate discrimination against the members of our society with disabilities, mandate that

citizens be empowered to enforce their Title II rights without restriction.

SUMMARY OF ARGUMENT

This Court has recognized that people with disabilities suffer discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate,* 469 U.S. 287 (1985); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987). In considering Title II, Congress had before it substantial and uncontroverted evidence of state-sponsored invidious discrimination against individuals with disabilities in the provision of public services, programs and activities. Indeed, states engaged in numerous activities that unconstitutionally discriminated against individuals with disabilities. While the *Garrett* Court's analysis was limited to conduct potentially violating the Equal Protection Clause, Title II also implicates other constitutional rights, including voting and access to the courts. As it relates to Title II, the legislative record identified violations in these and other constitutional categories.

In Title II, Congress provided for a congruent and proportional remedy for widespread constitutional violations by the states. In accordance with *City of Cleburne*, 473 U.S. at 442-43, where this Court recognized that the legislative branch is in a better position than the judiciary to address disability discrimination, Congress, in enacting

Title II, tailored appropriate and balanced legislation to remedy and deter continued discrimination against people with disabilities with respect to government-provided services.

The important limitations on Title II's remedial scheme provide further evidence of Congress's congruent and proportionate response to the endemic problem of disability discrimination by the states. By imposing significant restrictions on Title II's applicability, Congress appropriately balanced the needs of the states with meaningful protection against disability discrimination in public services, programs and activities. Accordingly, Title II is a valid exercise of Congress's Section 5 power.

ARGUMENT

I. This Court's Decision In *Board Of Trustees Of The University Of Alabama v. Garrett* Is Not Determinative Of The Issue Presently Before The Court.

This Court determined in *Garrett* that Congress failed to successfully abrogate state sovereign immunity in Title I of the ADA because the record did not adequately reflect a pattern of disability discrimination in state employment sufficient to justify application of the Title to the states, and because Congress failed to create a statutory remedy that was congruent and proportional to the targeted violation. *Board of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 368, 374 (2001). The Court did not extend this holding, however, to Title II of the ADA, governing the provision of public services, programs and activities. In footnote 1 of the *Garrett* opinion, this Court, recognizing

Title II's distinct remedial scheme, expressly declined to decide whether Title II could survive constitutional challenge. *Id.* at 360. Moreover, while this Court found the legislative record lacking with respect to evidence of disability discrimination in state *employment*, it explicitly noted that the "overwhelming majority" of accounts of disability discrimination in the legislative record "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Id.* at 371 n.7. Unlike Title I, Title II passes muster under the *Garrett* analysis.

II. Congress Properly Abrogated The States' Sovereign Immunity When It Enacted Title II Of The ADA.

Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) (citations omitted). Second, Congress must act in accordance with its enforcement power under Section 5 of the Fourteenth Amendment. *Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 59 (1996).

In adopting Title II, Congress clearly stated its intention to abrogate the states' Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

Thus, the remaining issue before the Court is whether Title II of the ADA constitutes a valid exercise of Congress's Section 5 power. To be valid under Section 5, Congressional enactments "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). In contrast to *Garrett*, the legislative record supporting Title II sufficiently documents constitutional injuries by the states. Congress made explicit findings to that end. Moreover, states voiced no opposition to abrogation.

A. Congress Identified Substantial Evidence Of Irrational State Conduct Supporting Its Finding Of A History And Pattern Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

The legislative record supporting Title II sufficiently documents state actions that were based on irrational stereotypes against people with disabilities and, therefore, even under rational basis scrutiny, such actions violated the Equal Protection Clause. *See City of Cleburne*, 473 U.S. at 450. For example, the record before Congress included the United States Commission on Civil Rights' report, *Accommodating the Spectrum of Individual Abilities* (1983), which details the history of state institutionalization and other policies that were applied in a discriminatory manner against people with disabilities. *Id.* at 32-37. These state practices often were unconstitutionally based on "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of people with disabilities.

City of Cleburne, 473 U.S. at 467 (Marshall, J., concurring and dissenting). As Justice Marshall declared: "A regime of *state-mandated* segregation . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462 (emphasis added).

The legislative record includes various examples of state conduct devoid of any rational basis: Congress heard that a blind voter with cerebral palsy was arbitrarily refused the right to register to vote in state elections, *see* 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1219-20 (Comm. Print 1990); it heard that state mental hospitals misused medications in treating their disabled, institutionalized patients, *id.* at 1203, 1262-63; it heard that such hospitals subjected their patients to abusive treatment and inhumane conditions, *id.*; it also heard that a blind woman was refused instructions on how to use her state's voting machines, Task Force on the Rights and Empowerment of Americans with Disabilities, *Alabama Submissions* 16.[1] The record also included a statement of a mother whose deaf son was charged with speeding. The judge chose to dismiss the charges because it was "cheaper" than to provide an interpreter for the court appearance. *Id.*, *Georgia Submissions* 374.

[1] This task force was appointed by the select chairman of the House Committee on Education and the final report was printed by the Government Printing Office at the behest of the Committee.

B. In Adopting Title II, Congress Identified State Discrimination That Violated The Fundamental Constitutional Rights Of People With Disabilities.

Unlike the legislative history of Title I, the record supporting Title II shows that discrimination by the states in public services impinged upon fundamental constitutional rights of people with disabilities, including such rights as parental rights, voting rights, access to the courts and prisoners' rights. Since a higher standard of scrutiny applies to these rights, Congress was justified in concluding that the record documented constitutional violations by the states.

In *Garrett*, the Court held that the record of state conduct was insufficient to justify abrogation of sovereign immunity, in part, because of the standard of review applicable to state treatment of people with disabilities, namely the rational basis test under the Equal Protection Clause.[2] The Court determined that the respondents failed to demonstrate that the identified state conduct could never have a rational basis. In contrast to Title I, Title II addresses state conduct that impinges upon fundamental constitutional rights embodied in the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. In such a case, a higher standard of scrutiny should apply. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972)

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[2] Because state employment is not a fundamental right, in evaluating evidence of unconstitutional state action supporting abrogation under Title I, the *Garrett* court was able to consider only the limitations placed on state conduct concerning people with disabilities by the Equal Protection Clause.

(holding that right to vote can be restricted only when purpose of restriction and overriding interests served thereby meet close constitutional scrutiny); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that due process requires state to provide meaningful access to courts absent showing of countervailing state interest of overriding significance); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

The record for Title II shows that people with disabilities were denied access to public facilities, including courthouses, legislative assemblies, and voting places. *See* U.S. Comm'n on Civil Rights, *supra*, at 21-22, 38-39; *see also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 662-64 (1989) (testimony of Mary Lynn Fletcher). This lack of access adversely impacted the ability of people with disabilities to effectively participate in the state governmental process, including the ability to exercise their right to vote[3] and to utilize the state judicial system.[4]

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[3] *See, e.g., Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong. 41, 45 (1989) (testimony of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana) (describing "devastating disincentives to voting" faced by people with disabilities).

[4] *See, e.g., Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on*

(Continued on following page)

For example, Congress heard that a disabled man, called to testify in court, had to get out of his wheelchair and pull himself up three flights of stairs to reach the courtroom. Task Force on the Rights and Empowerment of Americans with Disabilities, *Alabama Submissions* 15. A disabled man who was to appear as a witness in a criminal trial had to be carried by state troopers up two flights of stairs because he had no other means to access the courtroom. *Id.*, *West Virginia Submissions* 1745. A disabled woman, to reach the polls to vote in a general election, had to leave her wheelchair, walk with two canes up a flight of steps (taking 30 minutes), walk with her canes to the voting machine (taking 25 minutes), and hold on to the machine and beat on the levers with her cane to move them to cast her vote. *Id.*, *Delaware Submissions* 307. Dozens of people with disabilities from across the country offered statements describing the ways in which they were denied access to polling places or were otherwise hampered in their ability to cast their votes.

The legislative record supporting Title II, including evidence of violations of fundamental constitutional rights by the states, justifies Congress's judgment to apply Title II to the states.

Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (describing barriers faced by persons with disabilities that impeded their access to courts).

C. Congress Made Explicit Findings Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

Unlike Title I,[5] Title II is supported by express legislative findings of disability discrimination by the states. In the text of the statute itself, as well as in the Senate and House Committee Reports,[6] Congress made explicit findings of a history and pattern of state-sponsored discrimination in the provision of public services, programs and activities.[7] The statute expressly identifies persistent discrimination against people with disabilities in such areas of traditional state involvement as education, transportation, institutionalization,[8] health services, voting and access to public services, § 12101(a)(3), (5), as well as "outright intentional exclusion, . . . segregation, and relegation to lesser *services, programs, activities*. . . ." 42 U.S.C. § 12101(a)(5) (emphasis added).[9]

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[5] *See Garrett*, 531 U.S. at 370-372.

[6] The House and Senate Committee reports both make explicit conclusions with respect to discrimination in "public services." S. Rep. No. 101-116, p. 6 (1989) and H. R. Rep. No. 101-485, pt. 2, p. 28 (1990).

[7] "The congressional findings in 42 U.S.C. § 12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned." *Olmstead v. Zimring*, 527 U.S. 581, 613 (1999) (Kennedy and Breyer, JJ., concurring).

[8] *See, e.g., Olmstead*, 527 U.S. at 608 (Kennedy and Breyer, JJ., concurring) ("[T]he States have acknowledged that the care of the mentally disabled is their special obligation.").

[9] *See Olmstead*, 527 U.S. at 614 (Kennedy and Breyer, JJ., concurring) (stating that these findings "underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional

(Continued on following page)

Congress's findings that a pattern of state discrimination existed supporting Title II are entitled to great deference by this Court. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. New York*, 264 U.S. 292, 294 (1924). Moreover, "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court does "not lightly second-guess such legislative judgments." *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990).

D. Congress's Conclusion Is Buttressed By The Absence Of State Opposition To Title II.

It is also significant that the congressional testimony contains no opposition by the states to abrogation of their Eleventh Amendment immunity. In fact, the ADA was affirmatively endorsed by the National Association of Attorneys General. *See* 135 Cong. Rec. 19,799 (1989). Indeed, Illinois Attorney General Neil Hartigan provided persuasive testimony based on the six years he had served as a state Attorney General. He testified regarding the persistent and widespread discrimination against people with disabilities involving, for example, public transportation,

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settings and policies and its concern that segregating disabled persons from others can be discriminatory.").

public services, public parks, publicly owned facilities, special education and elections. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 75-78 (1989). Attorney General Hartigan urged passage of a uniform national standard to free people with disabilities from having to win their rights on a state-by-state basis.[10] *See id.* at 77. He further explained that any meaningful legislation to combat disability discrimination must include a remedial provision. *See id.* at 80-81.

Based on the foregoing, Congress had compelling and uncontroverted evidence of widespread state discrimination against people with disabilities in the provision of

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[10] The legislative record shows that although some states had enacted disability laws, the state statutes varied greatly and many provided little meaningful protection against disability discrimination. *See, e.g., Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 334-37 (1989) (statement of Arlene Mayerson) (describing limitations and ineffectiveness of existing state statutes); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 89 (1989) (statement of Hon. Chet Brooks, Texas State Senate) ("Just as with other major civil rights issues addressed by our nation in the past, basic rights for people with disabilities have to be addressed at a national level. We cannot effectively piece these protections together state by state, person by person."); *see also* H. R. Rep. 101-485, pt. 2, at 47 (1990) ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . . 'Too many States, for whatever reason, still perpetuate confusion.'") (quoting testimony of Admiral James Watkins before the House Subcommittee on Select Education and the Senate Subcommittee on the Handicapped).

public services, programs and activities, supporting its determination to abrogate state sovereign immunity in Title II.

III. Given The Substantial Evidence Of State-Sponsored Discrimination Against People With Disabilities, Title II Is A Measured And Balanced Response To Remedy And Deter State-Perpetuated Disability Discrimination.

Title II is both congruent and proportional to the evils found by Congress. This Court has acknowledged that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 536). This deference reflects the often complex problems facing the legislative branch. Because "difficult and intractable problems often require powerful remedies," Section 5 does not preclude Congress from creating congruent and proportional remedies around a core of documented constitutional shortcomings. *Id.* at 88.

Thus, legislation that deters or remedies constitutional violations may fall within the sweep of Congress's enforcement power even if, in the process, it prohibits conduct that is not itself unconstitutional. *City of Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). Congress is not confined to enacting legislation that merely parrots this Court's constitutional jurisprudence, but rather possesses the power under Section 5 " 'both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader

swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Garrett*, 531 U.S. at 365 (quoting *Kimel*, 528 U.S. at 81).

Title II's application to education is a ready example of the wisdom of allowing a degree of latitude to Congress in fashioning appropriate remedies for unconstitutional state conduct.[11] Congressional testimony demonstrated that individuals with disabilities were systematically denied basic educational opportunities. Although Congress had previously enacted legislation to promote educational opportunities for people with disabilities,[12] the 1983 Civil Rights Commission report determined that children with disabilities still were being deprived of an appropriate education. *See* U.S. Comm'n on Civil Rights, *supra*, at 28. Many children with disabilities simply were segregated in separate public educational facilities. *See id.* at 29. Other children with disabilities were excluded altogether from public schools for a variety of reasons, including that the children used wheelchairs, had epilepsy, or had cerebral palsy.[13] *Id.* at 27. These widespread practices necessarily

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[11] Because of the states' pivotal role in the provision of educational services, it was reasonable for Congress to conclude that Title II must include the states within its ambit for its remedial educational goals to be effectuated. The pivotal role of the states in the provision of educational services is demonstrated in the Individuals with Disabilities in Education Act, 20 U.S.C. § 1440, *et seq.*

[12] *See* 20 U.S.C. §§ 1400-1491 (originally enacted as the Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121, 175-188 (1970) and subsequently amended).

[13] *See* S. Rep. No. 101-116, at 7 (1989) (quoting testimony of Judith Heumann, World Institute on Disability); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ.*

(Continued on following page)

had a tremendous adverse impact on the victims of the discrimination and justify remedies that extend beyond the core of unconstitutional conduct. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the importance of education in maintaining our civic institutions and "the lasting impact of its deprivation on the life of the child").[14]

Title II represents a valid abrogation of sovereign immunity. First, Title II appropriately proscribes unconstitutional state conduct. Second, Title II's reasonable modification provision is consistent with states' constitutional responsibilities. Finally, the limitations Congress designed ensure that constitutional state conduct is not disproportionately proscribed.

A. Title II Reasonably Proscribes Unconstitutional State Conduct.

Title II is a valid exercise of Congress's Section 5 power because it directly targets unconstitutional state conduct. Members of this Court have recognized that Title II was designed to address discrimination unconstitutional under the Equal Protection Clause:

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of House Comm. on Educ. and Labor, 100th Cong. 132-33 (1988) (testimony of Barbara Waters).

[14] As this Court reasoned in *Plyler*: "The inestimable toll of that deprivation [of education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." 457 U.S. at 222.

> Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities.

Olmstead, 527 U.S. at 611, 613 (Kennedy and Breyer, JJ., concurring).

Moreover, while the Title I analysis in *Garrett* was limited to rational basis scrutiny under the Equal Protection Clause,[15] Title II protects constitutional rights beyond Equal Protection, such as the right of people with disabilities to meaningful access to the states' courts,[16] the right of people with disabilities to vote on an equal basis with other state citizens,[17] and the right of prisoners with disabilities to humane conditions of confinement.[18] State discrimination against people with disabilities with respect to these fundamental rights is subject to heightened review, and thus fully reasonable state conduct nevertheless could be unconstitutional.

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[15] *See supra* pp. 7-9.

[16] *See Bounds v. Smith*, 430 U.S. 817 (1977); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

[17] *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (denying citizens the right to vote deprives them of a "fundamental political right, . . . preservative of all rights.").

[18] *See Youngberg v. Romeo*, 457 U.S. 307 (1982).

Indeed, the *Garrett* Court's determination that Title I was disproportionate was premised on the limited reach of the Equal Protection Clause. For example, the Court noted that Title I would require an employer to modify existing facilities to accommodate a disabled employee although it would be entirely reasonable, and therefore constitutional, for the employer to instead choose to avoid the costs of providing accommodation by hiring employees who are able to use existing facilities. 531 U.S. at 372. In contrast, for example, although it may be reasonable for a state to desire to avoid the cost of providing an interpreter at the trial of a hearing-impaired criminal defendant, as would be required under Title II, this choice would violate the Due Process Clause. *See, e.g., Amadon v. Immigration & Naturalization Serv.*, 226 F.3d 724 (6th Cir. 2000) (holding that incompetent interpreter at deportation hearing deprived asylum applicant of due process right to full and fair hearing). The fundamental nature of the rights at stake justifies the breadth of Title II.

Accordingly, unlike Title I, Title II serves to protect fundamental rights in addition to Equal Protection rights. Title II is therefore a proportional response to unconstitutional state conduct.

B. Title II's Reasonable Modification Provision Is Consistent With States' Responsibilities Under The Constitution.

Given the pervasiveness of past prejudices and inequitable actions directed by states toward individuals with disabilities, Congress determined in its legislative judgment that it was not enough merely to prohibit future unconstitutional discriminatory conduct. Rather, to remedy and deter state discrimination against people with

disabilities, and further implement its Section 5 power, Congress required "reasonable modifications"[19] for qualified individuals with disabilities. A national problem of the magnitude documented by Congress and recognized by this Court, *see, e.g., City of Cleburne,* 473 U.S. at 454, 464-65, demands a solution that affirmatively prevents state-sponsored disability discrimination, provides meaningful access to public services, programs and activities, and thus integrates individuals with disabilities into public life.

In contrast to the overbreadth of the reasonable accommodation standard of Title I, which was a central part of the *Garrett* Court's analysis, Title II's analogue, reasonable modification, appropriately effectuates the states' constitutional responsibilities. The protection of fundamental rights often requires a state to do more than simply refrain from discriminating against its citizens. This and other courts have found that states are constitutionally required "to shoulder affirmative obligations" to ensure meaningful access to public services, as well as abolish barriers preventing such meaningful access.[20] *See Bounds v. Smith*, 430 U.S. 817, 824-25 (1977) (holding that fundamental right of access to courts required state to

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[19] 42 U.S.C. § 12131(2) requires reasonable modifications to rules, policies or practices, the removal of architectural, transportation and communication barriers, and the provision of auxiliary aids and services. The entirety of this provision will be referenced herein as the "reasonable modification provision." Regulations impose significant limitations on these requirements. *See, e.g.,* 28 C.F.R. § 35.130(b)(7).

[20] This Court, in *Plyler v. Doe*, recognized that one of the goals of the Equal Protection Clause is "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." 457 U.S. at 221-22. The reasonable modification provision of Title II directly serves this important goal.

provide inmates with adequate law libraries or adequate assistance from persons trained in the law; while economic factors may be considered in choosing method to provide meaningful access, "the cost of protecting a constitutional right cannot justify its total denial"); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act ban on voting literacy tests although literacy tests themselves do not violate the Equal Protection Clause; destruction of this barrier enabled individuals to better "obtain 'perfect equality of civil rights and the equal protection of the laws'") (citations omitted); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 72 (2002) (finding that state could be required to provide accommodation to hearing-impaired father in child custody proceedings both under Title II and as a matter of due process); *Amadon v. I.N.S.*, 226 F.3d 724 (6th Cir. 2000) (holding that due process right to full and fair deportation hearing required government to provide competent foreign-language interpreter).

In the same fashion as the cases cited above, Title II's "reasonable modification" provision enables people with disabilities to obtain their constitutionally guaranteed rights. Therefore, this provision is consistent with states' constitutional responsibilities.

C. Congress Imposed Important Limitations In Title II Which Produce A Congruent And Proportional Remedy.

In crafting Title II, Congress carefully considered the needs of state governments and included important limitations in the law. *See City of Boerne*, 521 U.S. at 533 (stating that limiting provisions in legislation "tend to ensure Congress's means are appropriate to ends legitimate under

Section 5"). Title II requires only reasonable modifications that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.[21] In addition, Title II does not apply to all individuals with physical or mental impairments, but, rather, only to those whose impairments substantially limit their major life activities.[22] Title II's regulations also serve to shorten the statute's reach into constitutional conduct. For example, regulations provide that when existing facilities are inaccessible, states are not required to make structural changes so long as the programs are made available to people with disabilities in some other manner. 28 C.F.R. § 35.150(b)(1).

Moreover, this Court's interpretation of Title II reinforces the limitations Congress has designed. For example, in *Olmstead v. Zimring*, this Court recognized that Title II permits the states to rely on the reasonable assessments of their own professionals in determining whether the essential eligibility requirements for habilitation in a community-based program are met. 527 U.S. at 602. In addition, this Court has recognized that Title II's reasonable modification provision does not impose "boundless"

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[21] 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7).

[22] 42 U.S.C. § 12102(2). *See, e.g., Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (holding that mitigating measures must be taken into account in determining ADA's coverage); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (construing ADA's definition of "disability" and noting: "That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act.").

responsibility upon the states. *Id.* at 603. For example, in the context of deinstitutionalization, this Court has construed the provision to permit states to take into account available resources and the needs of other mentally disabled persons. *Id.* at 607.

Thus, because Title II's intrusion into constitutional state conduct is minimal and states maintain substantial discretion over their provision of public services, programs and activities, Title II provides a congruent and proportional response to disability discrimination by the states.

CONCLUSION

Faced with well-documented incidents of state discrimination against people with disabilities in public services, Congress designed a comprehensive and integrated response that recognized the states' central role in the provision of such services. Unlike Title I, Title II involves an area of regulation for which people with disabilities have no options. That is, in contrast to employment, governments are the sole suppliers of public services. Because of the states' role, a decision by this Court that Congress did not validly abrogate Eleventh Amendment immunity may substantially diminish Title II's effectiveness. In this situation, the Court should grant Congress reasonable latitude in crafting remedies that people with disabilities can use without restriction.

For the foregoing reasons, this Court should affirm the decision of the Ninth Circuit Court of Appeals and hold that Congress, in enacting Title II of the ADA, validly

abrogated the states' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.

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